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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Policies and Rules) CC Docket No. 93-292
Concerning Toll Fraud)

To: The Commission

COMMENTS OF PUERTO RICO TELEPHONE COMPANY AND THE PUERTO RICO COMMUNICATIONS CORPORATION

Puerto Rico Telephone Company and the Puerto Rico Communications Corporation ("PRTC/PRCC"), by their attorneys and pursuant to 47 C.F.R. § 1.415, hereby submit their Comments on the Commission's Notice of Proposed Rulemaking in the captioned docket, Policies and Rules Concerning Toll Fraud, FCC 93-496 (rel. Dec. 2, 1993) ("NPRM"). The NPRM seeks comment on a variety of issues related to the problem of toll fraud.

I. INTRODUCTION

On February 21, 1993, the Florida Public Service Commission filed with the FCC a "Request to Review Interstate and International Tariff Provisions Relating to Liability for Toll Fraud Charges" ("Florida Petition").[1] In that Petition, the Florida PSC proposed that the Commission adopt regulations like those already extant in Florida to assign liability for losses

[1] Public Notice, DA 93-390, April 5, 1993.

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arising from payphone toll fraud. NPRM at ¶ 27. Under the Florida regulations, a pay telephone provider is released from liability for certain types of toll fraud if it purchases originating line screening and billed number screening from the local exchange carrier ("LEC") for the payphone line. Id. The Florida regulations require all payphone providers to purchase such services. Id. The losses from toll fraud are then assigned to the LEC if the losses are related to a "failure" of the LEC's screening services and to the interexchange carrier ("IXC") if they are associated with the IXC's failure to validate calls properly. Id. at n.42. The Commission, in its NPRM (at ¶ 31), has asked for comment on this approach, including "whether carriers should be required to modify tariff language limiting carrier liability for payphone fraud." The Commission has also asked for comment on how liability should be assigned for losses incurred through unauthorized use of joint use calling cards which manages to escape detection by the LEC through use of the LEC's line information database ("LIDB"). Id. at ¶¶ 36-38.

PRTC/PRCC is well aware of the toll fraud problem. It has experience with cellular and PBX toll fraud as well as payphone and LIDB toll fraud. Therefore, PRTC/PRCC heartily supports the Commission's goal of reducing the incidence of toll fraud. In pursuit of that goal, PRTC/PRCC is itself actively studying ways to minimize toll fraud in all parts of the network. For example, it is taking steps to implement originating line screening and billing number screening on its lines.

PRTC/PRCC is, however, concerned that the NPRM focuses largely on redistributing the economic losses caused by toll fraud among various industry participants rather than attempting to reduce or eliminate fraud itself. Moreover, even if the proper focus of this proceeding were merely to assign losses, the Commission's NPRM proposes to expand local exchange company liability for economic loss arising from toll fraud. The Commission must redirect its focus to address the real problem, the prevention of toll fraud.

II. THE COMMISSION SHOULD NOT EXPAND LEC LIABILITY FOR TOLL FRAUD LOSSES BEYOND THE LIMITED LIABILITY CURRENTLY CONTAINED IN LEC TARIFFS

The net result of the Commission's proposals would be to expand LEC liability significantly beyond its current limits. Currently, PRTC and PRCC's liability, like that of other LECs, is limited by a provision in their interstate access tariff. In PRTC/PRCC's case that tariff is the National Exchange Carrier Association ("NECA") interstate access tariff, which states:

> The Telephone Company's liability, if any, for its willful misconduct is not limited by this tariff. With respect to any other claim or suit, by a customer or by any others, for damages associated with the installation, provision, termination, maintenance, repair or restoration of service, and subject to the provisions of (B) through (G) following, the Telephone Company's liability if any, shall not exceed an amount equal to the proportionate charge for the service for the period during which the service was affected. This liability for damages shall be in addition to any amounts that may otherwise be due the customer under this tariff as a Credit Allowance for a Service Interruption.

National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5, § 2.1.3(A). As the Commission noted in its NPRM (at ¶ 39), provisions such as this which limit carrier liability except in cases of willful misconduct have appeared in carrier tariffs for many years, and they have repeatedly been found by courts to be valid.[2]

Commission expansion of LEC liability in the case of toll fraud would fly in the face of this age-old judicial precedent and the Commission's own longstanding decisions affirming a carrier's right to limit its liability. More importantly, such expansion of liability would run counter to the Commission's statutory mission of ensuring reasonable rates because increased liability results in increased cost to the LEC, which would ultimately be passed through to ratepayers.[3] As the Commission has said:

> [A]ll telephone ratepayers would bear the increased cost of litigation and settlement expenses as part of [the LEC's] revenue requirement were we to expand substantially telephone company liability. In other words, all ratepayers to some extent 'insure' against the liability which the telephone company must incur for nonintentional torts or service failures suffered by a relatively small number of users.[4]

The goal of liability limitation provisions is to "strike[] a reasonable balance between the rights of aggrieved customers and the public interest in the provision of telephone service at the lowest possible cost."[5] While toll fraud

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[2] See, e.g., Western Union Tel. Co. v. Esteve Bros. & Co., 256 U.S. 566, 571 (1921); Western Union Tel. Co. v. Priester, 276 U.S. 252, 259-260 (1927); Holman v. Southwestern Bell Tel. Co., 358 F.Supp. 727, 729 (D. Kan. 1973); Wheeler Stuckey, Inc. v. Southwestern Bell Tel. Co., 279 F. Supp. 712, 714-15 (W.D. Okla. 1967).

[3] See, e.g., Pilot Indus. v. Southern Bell Tel. & Tel. Co., 495 F. Supp. 356, 361 (D.S.C. 1979); Professional Answering Serv. v. Chesapeake & Potomac Tel. Co., 565 A.2d 55, 60 & nn. 9-11, 64-65 (D.C. 1989).

[4] AT&T, 76 FCC 2d 195, 198 (1980).

[5] Id. See also AT&T, 82 FCC 2d 370, 372 (1980).

is a growing problem, it is certainly not of a magnitude to justify increasing the cost of local telephone service for all ratepayers to compensate the few who are its victims, especially when ratepayers gain no benefit from LEC compensation to victims of toll fraud. Finding a "deep pocket" which is "better able to absorb the costs of fraud than payphone providers" (NPRM at ¶ 29) is an unjustifiable solution to the problem and results in no solution at all. Therefore, the Commission should not seek to modify the limitation of liability provisions contained in LEC tariffs.

III. THE IMPOSITION OF LIABILITY ON LECS FOR "FAILURE" TO MEET BRIGHT LINE STANDARDS OR THROUGH A DETERMINATION OF "FAULT" WILL DO LITTLE TO RESOLVE THE PROBLEM OF TOLL FRAUD

Even if the Commission were to decide to modify carrier limitation of liability provisions and require LECs to absorb a far greater share of the losses from toll fraud, the approaches suggested by the Florida Petition with regard to payphone fraud and by the Commission with regard to LIDB fraud do not solve the problem of assigning liability for toll fraud losses. In fact, they may very well exacerbate it. Both approaches require the development of bright line standards or operating procedures to be met by equipment owners, IXCs and LECs. When toll fraud occurs despite those standards being met, the approaches require a finding of "fault" or "failure" and assign liability to the IXC or LEC based on that finding. The result can be nothing other than lengthy and expensive disputes at the FCC and in the courts dealing with issues of fact to determine who actually was at fault, whether a carrier was negligent, and so on. The remedy proposed by the Commission for the problem of toll fraud will merely create new controversies over fault determinations. The costs of this approach will be added to those caused by toll fraud but the approach will do little to suppress toll fraud practices.

If the rule is that a LEC is liable for "failure" of its screening services or of its LIDB service, it will have to be determined what a "failure" is. For instance, if a LEC provides LIDB service but a toll fraud perpetrator uses a valid calling card, is that a "failure" by the LEC? The Commission has noted in the NPRM (at ¶ 36) that LECs are capable of detecting sudden increases in usage of a calling card which could suggest unauthorized use, but if the fraud takes the form of one long call or numerous calls that are spread out over time or diverse geographical areas (as when credit card numbers are posted on computer bulletin boards), the LEC may be unable to detect it. The LEC should not then be liable for losses relating to the fraud.

These proposals could well place LECs in an untenable position. Perpetrators of toll fraud are constantly developing new methods of placing calls without paying for them. It is impossible for LECs to prevent forms of fraud they do not know about, yet if a fraudulent call occurs through one of these new methods, it is not clear whether that would be found to be a "failure" of the LEC which would result in the imposition of liability. Thus, it is clear that the approach to toll fraud of developing specific standards or operating procedures and then determining "fault" or "failure" in complying with them is impractical and should not be adopted for the interstate market.

CONCLUSION

The goal of this proceeding should be to discover and implement ways to prevent toll fraud. Redistributing liability for the losses resulting from fraud achieves little in reaching a long-term solution to the problem.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jean M. Layton, hereby certify that a copy of the foregoing Comments of Puerto Rico Telephone Company was mailed, postage prepaid, this 14th day of January, 1994 to the following:

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